

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW
Evidence
Fall 2009

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FINAL EXAMINATION: PART II & PART III

Limited open-book. Two hours.

Write your exam number here: _____

All exam materials (including this booklet, any scratch paper, and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.

Notes and Instructions

1. You may write anywhere on the examination materials — e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
2. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
3. During the exam: You may not consult with anyone – necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
4. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam.
5. Assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the law in the United States, including all rules, procedures, and cases as presented in class.
6. Keep in mind: The weight given to each part is specified, but the “pauses” in Part II will not all be given equal weight. Thus, it may be entirely appropriate for one to be answered with considerable brevity, while another might require very detailed analysis. You should divide your time proportionately among the pauses according to which ones require the most discussion and analysis.
7. Organization counts.
8. Feel free to use abbreviations, but only if the meaning is entirely clear.
9. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please use a separate bluebook for Part II and Part III.
10. **Computers:** Please clearly label your answers to each question.
11. This exam is “limited open book.” The only materials to which you may refer during the exam, other than this exam booklet, scratch paper provided as part of the exam administration, and any special references specifically authorized by the Dean of Students office, are: (a) the authorized copy of the Evidence Wypadki, which will be distributed to you in the exam session, and (b) a “reference sheet,” consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which anything may be written and/or printed, including on both sides, front and back; and (c) the Federal Rules of Evidence, which will be distributed to you in the exam session. You may not consult or access any other piece of paper, including, but not limited to, a copy of the Evidence Wypadki that you have printed out yourself. No materials may be shared during the exam.
12. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
13. Good luck.

Part II
30 points
Approximately 90 minutes

Directions: At each **PAUSE**, note the most likely objection(s), the party making the objection(s), the basis for the objection(s), relief sought (if appropriate), opposing counsel's best response (if appropriate), and the correct judicial ruling (if appropriate).

Porky Pig is on trial for the murder of Wile E. Coyote (whose name is rather misleading as he was, in fact, a wolf and not a coyote at all). Porky Pig claims that Coyote was killed in self-defense. Officer Daffy Duck is the prosecution's first witness.

Before Officer Duck is called to the stand, the prosecution moves to exclude all of the named witnesses for the defense from the courtroom: Porky Pig, Wilbur, Babe, Petunia Pig, and Porky Pig's expert witness, Bugs Bunny.

PAUSE 1

Direct Examination of Officer Duck

Q: Directing your attention to October 31, 2009, were you on duty that day?

A: Yes, I was working as a patrol officer on the 4 p.m. to midnight shift.

Q: What happened at approximately 6 p.m.?

A: I got called out to the corner of Apple Street and Cherry Lane in Toontown.

Q: Did you go there?

A: Yes I did.

Q: And what did you find at that intersection, Officer Duck?

A: There was just one house at that corner. It was a large brick house. The front door was open. There was smoke coming out of the chimney. I heard squealing as soon as I exited my vehicle.

Q: What were the weather conditions at that time?

A: I really don't remember.

Q: Your honor, I ask that you take judicial notice of the fact that on October 31, 2009, it rained all night in Toontown.

PAUSE 2

* * *

Q: What happened after you exited the vehicle?

A: This pig, who was later identified as Wilbur, came running out of the house, shouting at me to follow him into the house. So I followed him inside.

Q: What did you see inside the house?

A: It was chaos.

PAUSE 3

A: I walked into a large living room. There were three pigs scurrying frantically about. I later identified them as Wilbur, Porky Pig, and Babe. There was smoke pouring out of a lit fireplace, clouding up the room. It made it a little hard for me to make sense of what I was seeing at first. Then I realized that Wile E. Coyote was inside of a large pot of water that was suspended over the fireplace. He was, sadly, the source of the smoke, and he looked to me as if he were dead.

Q: What did you do?

A: What could I do? I called for an M.E., an ambulance, and back-up. I got some water from the kitchen and doused the fire. I asked the pigs to sit down and we waited together in silence for 20 minutes before any help arrived.

Q: What happened once help arrived?

A: It took four officers to pull the pot out of the fireplace. Mr. Coyote was loaded onto a stretcher and taken away in an ambulance. My partner Tweety and I separated the three pigs and spoke to each in turn.

Q: Who did you talk to first?

A: Babe.

Q: What did he say?

A: I don't recall.

Q: Did you take any notes that evening?

A: I did.

Q: Your honor, I have in my hand Officer Duck's notes from the evening of October 31, 2009, marked as Government's Exhibit 1. I'd like to have Officer Duck read those notes at this time, and I move for admission of Exhibit 1.

PAUSE 4

* * *

Q: What did Babe say to you that night?

A: He said: "Oh my word! I can't believe Porky killed him. It all happened so fast. I'm just so overwhelmed, I can't believe it."

PAUSE 5

Q: Did you speak with Wilbur?

A: I did.

Q: What did Wilbur say to you that night?

A: He said "My house is gone! Coyote blew it down. It was made out of high-quality and one-of-a-kind straw, which I personally made by drying out a portion of my marijuana farm. And now it's gone. I'm glad he's dead, that bastard. "

PAUSE 6

Q: Did you speak with the defendant, Porky Pig?

A: I did.

Q: What did the defendant say to you?

A: He said, "I did it. I killed that rat bastard Wile E. Coyote. Good riddance. That wolf was scum."

Cross-Examination of Officer Duck

Q: Officer Duck, isn't it true that you were good friends with the victim, Mr. Coyote?

PAUSE 7

* * *

Q: Isn't it true that you have a reputation in the community as anti-swine?

PAUSE 8

* * *

Q: Your honor, I move to introduce Defendant's Exhibit 14, which is an op-ed written by Officer Duck that was published in the Toontown Herald on October 1, 2009, entitled "Swine Flu: Why We Should Punish The Pigs."

PAUSE 9

* * *

The prosecution next calls Petunia Pig, Porky's wife, to the stand.

Direct Examination of Petunia Pig

Q: Mrs. Pig, do you live with the defendant at the corner of Apple Street and Cherry Lane in Toontown?

A: I do.

Q: And were you at home on the evening of October 31, 2009?

A: I was.

Q: Did you speak privately with the defendant around 5:45 p.m. that evening?

A: I did.

Q: What did the defendant say to you?

PAUSE 10

* * *

Q: I'd like to show you Government's Exhibit 2, which is a photocopy of a signed confession from defendant.

PAUSE 11

* * *

Q: Do you recognize the signature at the bottom of this document Mrs. Pig?

PAUSE 12

* * *

The prosecution rests. Defense first calls the defendant, Porky Pig, to the stand.

Direct Examination of Porky Pig

Q: Walk us through the night of October 31, 2009.

PAUSE 13

A: Around 3 p.m., my brother Wilbur showed up at my door. He was visibly upset and shaken. There was a gash across his forehead, and he was bleeding rather profusely.

Q: Did Wilbur explain the gash on his head?

A: Yes. Wilbur said that Wile E. Coyote showed up at his house around 2:30 p.m., drunk as a skunk. He demanded to be let into Wilbur's house for dinner. Wilbur refused and Coyote threw a fit. Coyote said: "'Let me in, Let me in, little pig or

I'll huff and I'll puff and I'll blow your house in!" Then he did. Wilbur's house is made of straw, and Coyote just blew it down. Wilbur was lucky to escape from the rubble, but not without getting cut by some shelving that came off the wall.

PAUSE 14

Q: Did anyone else show up at your house that evening?

A: Yes, my brother Babe showed up not more than a half hour later. He too showed up in quite a state. His right arm was hanging a little askew and looked broken.

Q: Did Babe explain what had happened to him?

A: Yes. Babe said that his arm hurt tremendously and he thought it was broken. He explained that Wile E. Coyote had blown down his house, which was made of sticks, while he was still inside!

PAUSE 15

Q: What happened next?

A: That rat bastard Wile E. Coyote showed up at my house!

Q: Did you talk to him?

A: Sure, through the window. He had the nerve to demand to come into my house for dinner.

Q: Did you let him in?

A: No way! I told him to buzz off.

Q: And did he?

A: No! He grabbed a hold of my trellis and started climbing to the roof. He said "I'm coming in one way or another, and I'm having pork tonight!"

PAUSE 16

Q: What did you do?

A: I realized the only way in was through the chimney. So I lit a fire in the fireplace and placed a huge pot of water on the fire. I figured the steam would deter Coyote from coming down the chimney.

Q: Did it?

A: No. That idiot climbed on my roof, jumped into the chimney, fell down the chute and landed smack into the boiling water. He screamed for about 10 seconds, there was nothing I could do to help, really, and then he was silent.

Judge: Did anyone help you to place that pot of water on the fire?

PAUSE 17

Cross Examination of Porky Pig

Q: Isn't it true that you served 2 years in jail for receiving child pornography?

PAUSE 18

**Part III
10 points
Approximately 30 minutes**

You are a clerk for a justice on the United States Supreme Court. You are working on United States v. Gruber, which, it is hoped, will resolve a circuit split on the issue of whether FRE 804(a)(5) should be applied to bar the admission of hearsay by a presently unavailable declarant who was available for a deposition while the litigation was pending but was not deposed.

The facts of Gruber are as follows:

Hans Gruber was tried and convicted of the first-degree murder of Harry Ellis. The affidavit of an alleged co-conspirator, Karl Gudenov, was a critical element of the prosecution's case, and, on appeal, it is this evidence that Gruber contends should have been excluded from trial.

Shortly after the death of Ellis, the police began to investigate Gudenov as a possible suspect. They ultimately arrested Gudenov and, after interrogating him, obtained the signed affidavit in question. In this affidavit, Gudenov stated:

It was all about the vault and the bonds. Gruber and I were going to force the FBI to help us open the vault by cutting the power to the building, which is standard procedure in a hostage situation. We were going to steal the bonds from the vault and make a fortune. Unfortunately for us, John McClane got in the way. He stole the detonators we needed to pull off the heist. When Ellis came to us and said he could get the detonators back from McClane, we were hopeful. But McClane wouldn't budge. Ellis was useless, so Gruber shot him in the head.

After obtaining this affidavit, Gudenov was jailed and Gruber arrested. Three months before Gruber was scheduled to stand trial, the prosecution learned that Gudenov was suffering from advanced pancreatic cancer. One week before trial, Gudenov died.

The affidavit was admitted at trial under FRE 804(b)(3).

On appeal, Gruber is arguing that Gudenov was not “unavailable” under FRE 804(a)(5) because the prosecution could have deposed Gudenov prior to trial since it knew of his impending death. The affidavit, Gruber contends, is inadmissible hearsay.

Should the affidavit have been admitted or excluded? Remember, your conclusion is going to set the precedent for all future federal cases. State your conclusion and justify your position to the justice, who will be looking for substantial policy analysis to back up your conclusion.